FEB - 3 2016
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No. 15-274

In The

Supreme Court of the United States

WHOLE WOMAN'S HEALTH; AUSTIN WOMEN'S HEALTH CENTER; KILLEEN WOMEN'S HEALTH CENTER; NOVA HEALTH SYSTEMS D/B/A/ REPRODUCTIVE SERVICES; SHERWOOD C. LYNN, JR., M.D.; PAMELA J. RICHTER, D.O.; AND LENDOL L. DAVIS, M.D., ON BEHALF OF THEMSELVES AND THEIR PATIENTS, PETITIONERS

v.

JOHN HELLERSTEDT, M.D., COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES; MARI ROBINSON, EXECUTIVE DIRECTOR OF THE TEXAS MEDICAL BOARD, IN THEIR OFFICIAL CAPACITIES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE GOVERNORS OF TEXAS, ALABAMA, ARKANSAS, IOWA, KENTUCKY, LOUISIANA, MAINE, MISSISSIPPI, NEBRASKA, AND SOUTH DAKOTA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

The amici are a bipartisan group of state governors who have a substantial interest in enforcing and defending laws aimed at improving health outcomes for women seeking abortions.[1]

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[1] The parties in this case have consented to the filing of this brief. No counsel for a party has authored this brief, in whole (continued...)

Many States have enacted laws like House Bill 2 ("HB2") to improve the standard of care at abortion clinics, particularly at less-reputable clinics that operate at the margins of medical practice.

As the chief executives of their States, the Amici Governors also supervise executive agencies that regulate the safety of abortion clinics. As such, the amici are in a unique position to report on the safety violations that certain abortion clinics have accrued and on the dangers those violations pose for women's health.

Seeking to better inform the Court on the dangers posed by certain independent abortion clinics, and supporting the State of Texas's efforts to improve the standards of health care for women seeking abortions, the Amici Governors respectfully submit this brief in support of Respondents.[2]

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or in part, and no person, other than Amicus Curiae or its counsel, has made a monetary contribution to the preparation or submission of this brief. The Department of State Health Services (DSHS), whose Commissioner is a party in this case, is distinct from the Health and Human Services Commission (HHSC), which has a separate budget and a separate commissioner. DSHS and HHSC are related entities, however, with HHSC performing a supervisory role with DSHS and other agencies related to public health. One of the attorneys who assisted in the preparation of this brief is an employee of th Office of the Governor, but his salary is paid by HHSC, which is not a party to this case, but is an entity related to a party. See Sup. Ct. R. Rule 37.6.

[2] The Governor of Texas is not a party to this case and has never been so. He is elected independently of the Attorney (continued...)

SUMMARY OF THE ARGUMENT

Laws like HB2 are aimed at improving the standard of care at abortion clinics. HB2 was enacted in response to recommendations from the grand jury that indicted Kermit Gosnell. First, HB2 reflects concerns of the grand jury and state lawmakers that certain abortion clinics are practicing outside of mainstream medicine, with insufficient supervision from medical colleagues or state regulators. Second, HB2 also reflects concerns of the grand jury and state lawmakers that government bureaucracies tend to underenforce regulations against abortion clinics. By ensuring that doctors are affiliated with a local hospital and by raising the standard of care at clinics, laws like HB2 medicalize that practice of abortion and bring abortion clinics closer to mainstream medical practice.

HB2 was passed with clinics like Petitioner Whole Woman's Health in mind. The clinic has multiple locations in Texas with a long list of health and safety violations. A sample of these violations are provided in Part I(b), *infra*.

General of Texas, who is charged with defending state statutes in court. Amici Curiae and their counsel have no affiliation with the Office of the Attorney General of Texas.

ARGUMENT

I. THE CHALLENGED LAWS ARE AIMED AT IMPROVING HEALTH OUTCOMES AT ABORTION CLINICS, PARTICULARLY THOSE WITH POOR SAFETY RECORDS.

A. HB2 Was Enacted In Response To Safety Violations At Certain Abortion Clinics Operating At The Margins of Medical Practice.

1. HB2 raises the standard of care at abortion clinics by ensuring that the physician who performs an abortion is sufficiently credentialed to obtain admitting privileges and by requiring abortion clinics to raise their safety standards. See Act of July 12, 2013, 83rd Leg. 2d C.S., ch. 1, 2013 Tex. Gen. Law Serv. 5012-20 (codified at Tex. Health & Safety Code §§ 171.0031, 171.041-.048, 171.061-.064, 245.010-.011).

Texas enacted HB2 in response to the prosecution of Kermit Gosnell, who was charged with the murder of a woman and seven babies at his abortion clinic. See In re County Investigating Grand Jury XXIII, Misc. No. 9901-2008 (Pa. C.P.) (filed Jan. 14, 2011) (hereinafter, "Gosnell Grand Jury Report"). The grand jury report recommended several reforms to prevent future deaths at abortion clinics, one of which was that "[t]he Pennsylvania Department of Health should license abortion clinics as ambulatory surgical facilities." Id. The Pennsylvania General Assembly agreed with the grand jury's recommendation and enacted such a law. 35 Pa. Cons. Stat. § 448.806(h), added by 2011 Pa. Legis. Serv. Act 2011-122, §2.

The Texas Legislature followed close behind in passing HB2, which included an ambulatory surgical center requirement like Pennsylvania's. HB2 also included a requirement that doctors performing abortions secure admitting privileges at a nearby hospital, in accordance with recommendations from physicians and abortion rights groups. See NATIONAL ABORTION FEDERATION, "HAVING AN ABORTION?" YOUR GUIDE TO GOOD CARE (2000) (advising patients when "finding a doctor" to "make sure" that their doctor "should be able to admit patients to a nearby hospital (no more than 20 minutes away)").

The legislative history of HB2 reflects the Texas Legislature's concern with preventing future Gosnell-like tragedies and with protecting women seeking abortions from substandard care:

> Higher standards could prevent the occurrence of a situation in Texas like the one recently exposed in Philadelphia, in which Dr. Kermit Gosnell was convicted of murder after killing babies who were born alive. A patient also died at that substandard clinic. The bill would force doctors to upgrade their standards or stop performing abortions.

House Research Organization, Texas House of Representatives, Bill Analysis, HB 2, at 10-11 (July 9, 2013).

HB2's heightened standards of care also address a different problem identified by the Gosnell grand jury report: the tendency of government bureaucracies to underenforce abortion regulations.

Abortion politics makes it uniquely difficult to regulate abortion clinics. Agency bureaucrats are notoriously risk adverse, and they invite controversy, lawsuits, and bad press when they try to bring rogue abortion clinics to heel. Gosnell Grand Jury Report, at 137-207 ("Even nail salons in Pennsylvania are monitored more closely for client safety" than abortion clinics.). Never has an agency head been criticized in the New York Times for bringing the coercive power of the State to bear on an orthodontist. HB2 raises safety standards high enough to prevent tragedies like Gosnell even when government regulators decide to look the other way.

Thus, laws like HB2 reflect the States' experience with regulating abortion clinics and their judgment that merely requiring abortion providers to hold medical degrees and submit to annual inspections by bureaucrats is not sufficient to ensure high-quality health care for women seeking abortions. And these quality-control problems extend well beyond Kermit Gosnell. See *Planned Parenthood of Wis., Inc.* v. *Van Hollen*, 738 F.3d 786, 802-03 (7th Cir. 2013) (Manion, J., concurring in part and concurring in the judgment) (detailing the Gosnell scandal); Denise Lavoie, *Doctor Gets 6 Months in Abortion Patient Death*, ASSOCIATED PRESS, Sept. 14, 2010 (reporting that Rapin Osathanondh was pleading guilty to involuntary manslaughter in the case of a woman who died after he performed an abortion on her); Lynette Holloway, *Abortion Doctor Guilty of Murder*, N.Y. TIMES, Aug. 9, 1995, (reporting that Dr. David Benjamin was convicted of second-degree murder resulting from a botched abortion).

2. Laws Like HB2 Align Abortion Clinics More Closely With Mainstream Medical Practice.

By ensuring that doctors are affiliated with local hospitals and by improving safety standards at clinics, HB2 aligns abortion clinics more closely with mainstream medical practice. Neither state regulators nor women seeking abortions stand to gain anything whatsoever from an abortion industry that practices medicine from the shadows. Laws like HB2 help medicalize the practice of abortion and thereby draw doctors and clinics into the sunlight.

Prominent defenders of abortion rights have long lamented the fact that the abortion industry has been cast out of mainstream medicine. Before the Court's decision in *Roe* v. *Wade*, eighty percent of the nation's abortion facilities were hospitals. Shortly after *Roe*, one hundred professors of obstetrics and gynecology predicted in a letter that freestanding abortion clinics would be unnecessary if hospitals and obstetricians would handle "their proportionate share." See Emily Bazelon, *The New Abortion Providers*, N.Y. TIMES, July 18, 2010 ("OB-GYNs at the time emphasized that abortion was a surgical procedure and fell under their purview."). Today more than ninety percent of abortions are performed at freestanding clinics, where patients often pay cash at strip-mall facilities miles from the nearest hospital. Id. A study of the post-*Roe* era by abortion-rights activist Professor Lori Freedman draws a contrast between the medicalization of birth and the ostracism of abortion:

> In comparison to the way birth was subsumed and medicalized by the medical profession, abortion

> experienced almost the opposite trajectory. Abortion turf seemed to have lost its appeal as it was gradually excised from mainstream medicine, leading to the near-total segregation of abortion care to freestanding clinics.

LORI FREEDMAN, WILLING AND UNABLE: DOCTORS' CONSTRAINTS IN ABORTION CARE (2010).

HB2 reverses this trend in at least two ways. First, HB2's admitting privileges requirement ensures that abortion doctors integrate with their colleagues and become part of the club. One of the first steps taken by doctors in the 1970s who wished to drive away their colleagues who performed abortions was to deny them hospital privileges:

> Abortion providers recounted experiences of being denied surgical privileges at hospitals, skipped over for anticipated medical leadership positions, and excluded from medical societies.

CAROL E. JOFFE, DOCTORS OF CONSCIENCE: THE STRUGGLE TO PROVIDE ABORTION BEFORE AND AFTER *ROE* V. *WADE* (1995). And Texas law gives teeth to HB2's admitting privileges requirement by expressly prohibiting hospitals from discriminating against doctors who perform abortions and by conferring a private right of action on victims of such unlawful discrimination. Tex. Occ. Code § 103.002(b); id. § 103.003; see also 42 U.S.C. § 300a-7(c)(1) (prohibiting hospitals that receive federal funds from discriminating against physicians who perform abortions).

The second way HB2 reverses the trend of abortion physicians retreating to the shadows is to make abortion clinics more like a doctor's office. Before HB2, inspections of abortion clinics repeatedly found rusty equipment, leaky pipes, and expired medicine. See *infra* Part B. By addressing issues like these, HB2's ambulatory surgical center requirement improves patient safety while at the same time protecting the dignity of patients and clinics alike.

Indeed, this lawsuit amounts to special pleading on behalf of independent abortion clinics like Whole Woman's Health who would prefer not to comply with HB2's standards of cleanliness and safety. Petitioners seek from this Court a constitutional rule that would allow the practice of abortion to drift even further away from mainstream medicine.

It is entirely rational for a profit-maximizing entity like Whole Woman's Health to resist safety regulations that impose costs. But like all doctors, the physicians at clinics like Whole Woman's Health have a legal obligation to comply with reasonable health and safety regulations. There is nothing exceptional about the practice of abortion that should lead the Court to endorse a constitutional right to the unsafe practice of medicine, which doctors in no other context enjoy. And abortion doctors certainly should not be allowed to bring such constitutional claims on behalf of the very patients whose lives are at stake. It cannot be disputed that laws like HB2 make abortions safer. Petitioners ask the Court to take a step in the opposite direction.

B. Petitioner Whole Woman's Health Is the Sort of Independent Abortion Clinic That Laws like HB2 Are Aimed at Improving.

1. HB2 was passed with clinics like Whole Woman's Health in mind. The clinic's multiple Texas locations have an unenviable safety record. The Texas Department of State Health Services conducts yearly inspections of all abortion clinics in Texas. A sample of the numerous safety violations noted by inspectors sent to Whole Woman's Health is provided below.

The Beaumont location of Whole Woman's Health has a longstanding problem with proper "infection control standards." The annual inspection in 2011 reported, among other things:

"[N]umerous rusty spots on the suction machine used on the patient for evacuation of the products of conception," DSHS Annual Inspection Report (redacted), WWH of Beaumont (Nov. 17, 2011);

"[F]loors were stained and discolored," *id.*;

"[A] hole in the procedure room," *id.*;

"[E]xpired sterile supplies," *id.*;

"[S]taff did not know what a sterilization indictor was nor did she know how to properly seal the peel pouch," *id.*;

"[T]he facility failed to staff the clinic with a registered nurse or licensed vocational nurse," *id.*;

"[T]he facility failed to provide a safe and sanitary environment," *id.*;

"[A] hole in the floor right in front of the patient's bed," *id.*;

"[T]he facility failed to provide safe equipment in the patient's procedure room," *id.*;

"[T]he facility failed to ensure staff was trained in CPR," *id.*;

"[T]he facility failed to have current emergency medication in the emergency crash cart," *id.*; and

"[T]he emergency crash cart [had] a laryngoscope blade but no laryngoscope handle. When questioned the Administrator where the laryngoscope handle was located, she stated the batteries had eroded and ruined the handle, so the handle had been thrown away." *Id.*

Similar violations were present the following year during the 2012 inspection of the Beaumont facility: "[S]taff members failed to perform the correct procedure for sterilization of surgical instruments," DSHS Annual Inspection Report (redacted), WWH of Beaumont (Dec. 19, 2012); "[F]acility failed to maintain the sterility of the surgical instruments before coming into contact with the sterile field," *id.*; "[T]he sterilizer had a gasket leak and the door on the autoclave was not opening properly. Questioned when the safety checks were completed why were these problems not identified? He stated that the facilities did not want to pay for the function check." *Id.*

Still more violations were present at the Beaumont facility in 2013: "[T]he facility failed to provide a safe environment for patients and staff," DSHS Annual Inspection Report (redacted), WWH of Beaumont (Oct. 3, 2013); "[N]umerous rusty spots on the suction machines used on the patient for evacuation of the products of conception," *id.*; "[A] six

inch hole in the flooring had the likelihood to allow rodents to enter the facility," *id.*; "[T]he facility failed to have electrocardiograph monitoring equipment ready if an emergency situation occurred in the facility," *id.*; "[E]xpired drugs in the procedure room and in the pathology room." *Id.*

The Beaumont location was not cherry-picked for purposes of this brief. Over the past few years, Whole Woman's Health clinics in McAllen, San Antonio, and Fort Worth have fared no better. All repeatedly have been cited for violations involving poor sterilization practices, expired medicine, inadequate training of staff, and failure to inspect or maintain equipment. DSHS Annual Inspection Report (redacted), WWH of McAllen (Nov. 10, 2015); DSHS Annual Inspection Report (redacted), WWH of San Antonio (Oct. 21, 2015); DSHS Annual Inspection Report (redacted), WWH of Fort Worth (Oct. 6, 2015); DSHS Annual Inspection Report (redacted), WWH of Fort Worth (Jun. 24, 2014); DSHS Annual Inspection Report (redacted), WWH of McAllen (Sept. 4, 2013); DSHS Annual Inspection Report (redacted), WWH of San Antonio (Aug. 29, 2013); DSHS Annual Inspection Report (redacted), WWH of Fort Worth (Mar. 15, 2011).

2. Physicians at Whole Woman's Health also practice medicine in a manner discouraged by the FDA and banned by national organizations like Planned Parenthood. For example, Whole Woman's Health has admitted to promoting a risky abortion method despite the FDA's "stern warnings" that the method was associated with patient deaths. In early 2006, after back-to-back deaths at its clinics, Planned Parenthood announced that it would

immediately prohibit its doctors from prescribing misoprostol for vaginal administration. See Gardiner Harris, *After 2 More Deaths, Planned Parenthood Alters Method for Abortion Pill*, N.Y. TIMES, Mar. 18, 2006. Six years before Planned Parenthood's announcement, in late 2000, the FDA had approved misoprostol for oral use only, but soon after the drug's approval, abortion doctors nationwide began prescribing misoprostol for vaginal administration at home. *Id.* This off-label use yielded advantages for clinics and patients, but it soon was linked to death from infection. Id. ("[A]s reports of deaths among women undergoing the procedure trickled into the FDA, government officials issued stern warnings that doctors to should stick to the approved regimen. Until Friday, Planned Parenthood had rejected those warnings.").

Planned Parenthood's decision to forego the vaginal administration of misoprostol in 2006 "partly resolve[d] a long-running dispute between Planned Parenthood and the Food and Drug Administration over the safest way to provide pill-based abortions." Id. But independent clinics like Whole Woman's Health were reluctant to fall in line. Seven years after Planned Parenthood heeded the FDA's warnings, Whole Woman's Health admitted in federal court that its doctors still were encouraging the vaginal administration of misoprostol. See HB2 lawsuit, Vol. II 66:22-24 (Oct. 29, 2013) (Doc. 100); see also JA606-700 (complication reports related to the administration of misoprostol).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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February 2016